Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	:	CC Docket No. 01-92
	:	
Developing a Unified Intercarrier Compensation Regime.	:	
	:	

COMMENTS OF THE PUBLIC UTILITIES COMMISSION OF OHIO

Jim Petro
Attorney General of Ohio
Duane Luckey, Senior Deputy

Steven T. Nourse
Steven L. Beeler
Assistant Attorneys General
Public Utilities Section
180 East Broad Street
Columbus, Ohio 43215-3793
(614) 466-4396
Fax: (614) 644-8764
steven.nourse@puc.state.oh.us
steven.beeler@puc.state.oh.us

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BACKGROUND AND INTRODUCTION

On July 24, 2006, the National Association of Regulatory Utility Commissioners (NARUC) filed an intercarrier compensation reform plan (the "Missoula Plan" or "Plan") facilitated by its Task Force on Intercarrier Compensation. Although the Plan was filed by the NARUC Task Force, members of the Task Force and NARUC have not taken positions on the Plan. The modified schedule for comments on the Plan established a deadline for initial comments of October 25 and reply comments are now due by December 11, 2006. The Public Utilities Commission of Ohio (Ohio Commission) hereby submits its responses, comments and recommendations concerning the Plan.

DISCUSSION

I. When reforming interstate carrier compensation, the FCC should preserve State commission authority over intrastate access charges and reciprocal compensation.

In its prior FNPRM, the FCC acknowledged that "any unified regime requires reform of intrastate access charges, *which are subject to state jurisdiction*." *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, FCC 05-33 (rel. March 3, 2005) at ¶63 (emphasis added; hereinafter "FNPRM"). But the FNPRM also went on to question whether the FCC might have authority to supplant State jurisdiction over intrastate access charges by establishing an alternative mechanism. *FNPRM* at ¶79. The FCC asked if the "mixed use" doctrine could justify preemption of State commission authority over intrastate access charges based on the uncertainty of a customer's location where that customer is using IP-based services. *FNPRM* at ¶80.

The Missoula Plan proposes to go even further than the FNPRM seemed to contemplate, since federally-imposed rate caps for intrastate access *and* reciprocal compensation are "central to the [Missoula] Plan." *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, The Missoula Plan for Intercarrier Compensation Reform, FCC 05-33 (filed July 24, 2006) at 5 (hereinafter "Missoula Plan"). Thus, the Missoula Plan involves the same fundamental legal issues presented in the FCC's prior FNPRM relative to access charges. As discussed in detail below, federally-established reciprocal compensation rates would also violate the Telecommunications Act of 1996 ("1996 Act").

Missoula Plan supporters generally assert and imply that the FCC has legal authority to broadly preempt State commissions regarding intrastate access charges and ratesetting for reciprocal compensation of local traffic, although many details and questions are left unaddressed. For example, for Tracks 1 and 2, carriers may petition the FCC to preempt State authority over intrastate originating access rates at Step 2 (but not before). It is not clear why this preemption ability relates only to Track 1 and 2 carriers or why it applies at Step 2 but not before; likewise, the legal basis for preempting intrastate originating access rates is not evident nor is the basis for distinguishing terminating access. Similarly, there is no legal basis for the FCC to supersede the ratesetting function associated with reciprocal compensation that was established by Congress and has been acknowledged by federal courts as being within the authority of State commissions.

Ironically, the Missoula Plan simultaneously assumes that State commissions going along with this federal scheme would retain legal authority over intrastate access rates and may continue establishing rates for intrastate access charges and reciprocal compensation rates. This makes no sense. This feature of the Plan also presumes without any legal justification that State commissions can voluntarily cede their legal jurisdiction to the FCC and that State acquiescence somehow enlarges federal jurisdiction. State commissions cannot lawfully abdicate their statutory authority any more than the FCC can unilaterally expand its own jurisdiction. Thus, Missoula Plan supporters would tell state commissions that "you can quit working or you will be fired." Such a Hobson's choice is meaningless and has no legal/jurisdictional basis.

For similar reasons, raising the SLC to $10 is not a logical or legally-justified solution to enable access charge reform. The interstate SLC has always been justified as recovering the federal share (25%) of loop costs;[1] thus, a $10 SLC would imply a $40 total loop cost. Yet, Court-approved determinations of loop costs using the FCC's TELRIC pricing methodology have consistently yielded much lower results (*e.g.,* in the $10 range) for total loop costs. Adding insult to injury, the Plan offers up a myopic "incentive" (the Early Adopter Fund) in a transparent attempt to extort cooperation by State commissions.

The Ohio Commission submits that the FCC lacks authority to lawfully displace State jurisdiction over intrastate access charges. When reviewing the 1996 Act and the Communications Act as a whole, it is apparent that Congress never intended federal displacement of State authority over intrastate access charges or reciprocal compensation rates. Further, relative to reciprocal compensation rates, the Act makes clear that State commissions, not the FCC, have authority to establish reciprocal compensation rates. Consequently, the FCC cannot establish reciprocal compensation rates at all – let alone a national, uniform rate that is not based on cost. It is also untimely and inappropriate as a policy matter for the FCC, after nearly a decade of implementing the 1996 Act, to entertain a fundamentally different and novel interpretation that changes the entire scope of the Act's local competition provisions with reference to intercarrier compensation.

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[1] According to the FCC, the cost of the local loop is" recovered through charges levied at both the state and federal levels, with approximately 25 percent collected via federal charges." *See* Federal Communications Commission, *The Facts on ISDN*, (May, 1995) *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Informal/ilcc5001.wp (last visited October 25, 2006).

Even if the FCC concludes that it possesses the authority to preempt State commissions concerning intrastate access charges, the FCC should not radically change the carrier compensation system without simultaneously resolving the impact of such reform on carriers and customers and the resulting problems that will immediately be faced by State regulators. The Missoula Plan does not address those issues comprehensively and leaves many important questions unanswered. As a result, after addressing the legal/jurisdictional arguments, the PUCO expounds below on its substantive policy recommendations concerning the major issues presented in this docket. The Ohio Commission's substantive policy recommendations discussed below are intended primarily for use in implementing interstate access charge reform but some of them could also be considered in the context of developing a unified compensation system should the FCC reject Ohio's jurisdictional position regarding intrastate access charges and reciprocal compensation rates.

A. State authority over intrastate access charges is preserved by the 1996 Act.

Since the 1996 Act was passed, the FCC consistently recognized the limited scope of the 1996 Act amendments relative to State commission jurisdiction over intrastate services. From the very first FNPRM implementing the 1996 Act, the FCC offered the following assurance to States regarding the jurisdictional reservation found in Section 152(b):

> We note that *Sections 251 and 252 do not alter the*

> *jurisdictional division of authority with respect to matters falling outside the scope of these provisions.* For example, rates charged to end users for local exchange service, which have traditionally been subject to state authority, continue to be subject to state authority.

Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Notice of Proposed Rulemaking, FCC 96-182 (rel. April 19, 1996), 11 FCC Rcd. 14,171 at ¶40 (emphasis added; footnote omitted). Hence, the FCC has already acknowledged that Congress' 70-year old jurisdictional reservation of State commission authority over intrastate communication services, found in 47 U.S.C. §152(b), still applies to matters not covered by Section 251. Indeed, as mentioned above, the FCC's FNPRM in this docket stated that intrastate access charges "are subject to state jurisdiction." *FNPRM* at ¶63.

More importantly, the United States Supreme Court has definitively concluded that the original design of dual jurisdiction over telephone services found in the Communications Act of 1934 survives the 1996 Act amendments. The high Court rejected the notion that Section 152(b) has become a nullity and, instead, reinforced its ongoing vitality:

> After the 1996 Act, §152(b) may have less practical effect. But that is because Congress, by extending the Communications Act into local competition, has removed a significant area from States' *exclusive* control. Insofar as Congress has remained silent, however, § 152(b) continues to function. The Commission could not, for example, regulate *any aspect of intrastate communication not governed by the 1996 Act* on the theory that it had ancillary effect on matters within the Commission's primary jurisdiction.

AT&T v. Iowa Utilities Board, 525 U.S. 366, 381 (note 8) (1999) (emphasis added). Consequently, it is already settled law that the FCC *simply cannot preempt State authority* concerning areas not granted exclusively to the FCC by the 1996 Act.

Likewise, the "mixed use" doctrine does not support FCC preemption of State intrastate access charge authority. Preemption on this basis is only permitted only when there are both interstate and intrastate aspects of a single service and where those aspects cannot be separated. *See, e.g., Public Service Comm. v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990). It cannot be reasonably concluded after decades of separation that interstate and intrastate access services have suddenly become inseparable. *See NARUC v. FCC*, 457 F.3d 1238, 1255-58 (11th Cir. 2006). (FCC must convincingly explain and justify change in position relative to preemption issue). The two examples offered in ¶ 80, of the FNPRM cellular and IP-based traffic, do not support a finding of impossibility for those industries, let alone for telecommunications services generally.

Whether packet-based services are ultimately upheld as being interstate in nature and subject to exclusive regulation by the FCC will be determined outside the context of this docket. Carrier compensation for VoIP traffic is but one of the serious questions posed concerning the provision of VoIP that is connected through the Public Switched Telephone Network (PSTN). The FCC may end up creating a separate rule for packet-based traffic, especially if it is determined to be an information service – something that is unquestionably beyond the scope of Section

251(b)(5) and Section 251 generally. Likewise, given the FCC's rate authority over cellular services, it may have to create a special set of rules for that traffic.

Regardless of the outcome of those matters, there is no factual or legal basis to "bootstrap" those problems into a general observation that wireline communications cannot be separated for purposes of interstate and intrastate carrier compensation. As long as telephone numbers are used to connect calls, there simply is no basis to generally conclude that the jurisdictional separations process has suddenly become impossible for purposes of applying interstate and intrastate access charges to wireline communications.

Indeed, concluding that Congress intended to displace State authority over intrastate access charges would contravene not just Section 152(b)'s dual jurisdictional design that preserves State intrastate authority, but would violate several other provisions of the Act. As a threshold matter, the 1996 Act amendments define "State commission" as the State agency that "has regulatory jurisdiction with respect to intrastate operations of carriers." 47 U.S.C. § 152(41) (West 2006). Thus, Congress acknowledged directly that State commissions would continue to have intrastate jurisdiction under the 1996 Act amendments.

Other provisions within the Act also consistently uphold and re-affirm the fact that the FCC has jurisdiction over interstate services and State commissions continue to exercise jurisdiction over intrastate services under the 1996 Act. *See, e.g.,* 47 U.S.C. § 214(e)(3) (West 2006) (divides duties between the Commission with respect to interstate services and a State commission with respect to intrastate services); 47 U.S.C. § 254(f), (g) (West 2006) (same); 47 U.S.C. § 410 (West 2006) (separation of intrastate and interstate jurisdiction and operation of joint boards for the purpose of regulatory comity and cooperation). Congress was also careful to preserve State authority, through inclusion of several "savings" provisions within the 1996 Act.

Section 251(d)(3) is entitled "Preservation of State Access Regulations" and it precludes the FCC from blocking enforcement of any regulation, order, or policy of a State commission that establishes access and interconnection obligations for LECs, is consistent with the requirements of the section and does not substantially prevent its implementation. 47 U.S.C. § 251(d)(3) (West 2006). That section is clearly instructive and applicable to intrastate access charges. Likewise, Section 253(b) preserves State regulatory authority to impose requirements necessary to preserve and advance universal service (a consideration highly pertinent to access charge reform) or to protect the public safety and welfare (also pertinent). 47 U.S.C. § 253(b) (West 2006). A similar example is found in Section 261(c), where Congress reiterated that nothing "precludes a State from imposing requirements on a telecommunications carrier for *intrastate* services that are necessary to further the provision of telephone exchange service or *exchange access*," consistent with the Act. 47 U.S.C. § 261 (West 2006) (emphasis added).

Separate and apart from those specific statutory manifestations of

Congressional intent to preserve State authority over intrastate communications (including intrastate access charges), the Supreme Court has generally established a special requirement of showing clear Congressional intent where pre-emption touches an area traditionally regulated by States. When Congress legislates in a field that the States have traditionally occupied, the Court must assume that the historic police powers of the States were not to be superseded by the Federal Act, unless that was the clear and manifest purpose of Congress. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542, 121 S. Ct. 2404, 2414, 150 L.Ed.2d 532 (2001); *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L.Ed. 1447 (1947). It has long been settled that "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *New Orleans Public Service, Inc. v. City of New Orleans*, 491 U.S. 350, 365-366, 109 S. Ct. 2506, 2517, 105 L.Ed.2d 298 (1989) (and cases cited therein). *See also NARUC v. FCC*, 457 F.3d 1238, 1252 (11th Cir. 2006). This presumption against pre-emption of State police power regulation results in a narrow reading of even an expressly *pre-emptive* provision. This narrow inquiry is particularly appropriate in light of the multiple savings clauses found in the 1996 Act that are applicable to intrastate access charges. *See* 47 U.S.C. §§ 251(d)(3), 253(b), 261(c) and 601(c)(1) (uncodified) (West 2006).

Congress knows how to expressly preempt intrastate authority when it wants to do so. For example, Section 332(c)(3) preempts State "authority to regulate the entry of or the rates charged by any commercial mobile service." 47 U.S.C. § 332(c)(3) (West 2006). On another topic, Congress enacted Section 276 as part of the 1996 Act and decided to override the dual jurisdictional design relative to payphone services by expressly authorizing the FCC to regulate payphone line rates even though they would otherwise be considered an intrastate service. 47 U.S.C. § 276 (West 2006). Congress knows how to override Section 152(b) – but it simply has not done so relative to intrastate access charges.

The D.C. Circuit has recently explained in a similar context the post-*AT&T* legal standard for over-riding Section 152(b):

> While the apportionment of regulatory power in this dual system is, of course, subject to revision, whether the Commission may preempt state regulation of intrastate telephone service depends, as in "any pre-emption analysis," on "whether Congress intended that federal regulation supersede state law." The "best way" to answer that question, the Supreme Court has instructed, "is to examine the nature and scope of the authority granted by Congress to the agency." In cases involving the Communications Act, that inquiry is guided by the language of section 152(b), which the Supreme Court has interpreted as "not only a substantive jurisdictional limitation on the FCC's power, but also a rule of statutory construction."

New England Pub. Comm. Council v. FCC, 334 F.3d 69, 75 (D.C. Cir. 2003) (citations omitted). Applying this standard, the D.C. Circuit has held that the statutory basis must be "so unambiguous or straightforward so as to override the command of § 152(b)." *Illinois Pub. Telecomms. Ass'n.*, 117 F.3d 555, 561 (D.C. Cir. 1997). Far from unambiguously supporting preemption, all of the several statutory provisions discussed above would be betrayed if the FCC attempts to categorically preempt intrastate authority over access charges. In short, there is no plausible basis for the FCC to attempt a broad-based preemption of State commission authority concerning intrastate access services.

B. Section 251(g) does not justify broad preemption of intrastate access charges.

The prior FNPRM referenced ICF's position that Section 251(g) of the 1996 Act supports preemption of State authority over intrastate access charges. *FNPRM* at ¶82. Because of the unique nature of this provision, it is being addressed separately. But, consistent with the above discussion of the 1996 Act provisions, the Ohio Commission submits that Section 251(g) also fails to provide an adequate basis for preemption of State authority over intrastate access charges.

The FCC itself, in the *ISP Remand Order*, has directly concluded that, under Section 251(g), the listed access services "remain subject to Commission jurisdiction under Section 201 (or, to the extent they are *intrastate* services, they remain subject to the jurisdiction of state commissions) . . ." *In the Matter of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd. 9151 (April 27, 2001 Order on Remand) ("ISP Remand Order") at ¶39. The *ISP Remand Order* went on to emphasize that Section 251(g) was expressly limited to interstate access requirements:

> By its express terms, of course, section 251(g) permits the

> Commission to supersede pre-Act requirements *for interstate access services*. Therefore the Commission may make an affirmative determination to adopt rules that subject such traffic to obligations different that those that existed pre-Act. For example, consistent with that authority, the Commission has previously made the affirmative determination that certain categories of *interstate* access traffic should be subject to section 251(c)(4).

ISP Remand Order at ¶41 (emphasis added). Even beyond those crystal clear statements, the FCC again explicitly reiterated that Section 251(g) does not directly govern intrastate access regimes that the statute "expressly preserves only *the Commission's* traditional policies and authority over *interstate* access services." *ISP Remand Order* at ¶37 (note 66).

Although the D.C. Circuit reversed the *ISP Remand Order*'s conclusion that Section 251(g) categorically exempted ISP-bound traffic from reciprocal compensation under Section 251(b)(5), the Court did not disturb the FCC's findings relative to the interstate scope of Section 251(g). *Worldcom v. FCC*, 288 F.3d 429 (2002 D.C. Cir.). Rather, *Worldcom* simply reversed the FCC's reliance on Section 251(g) as authority to carve out ISP-bound traffic from reciprocal compensation requirements because: (1) there was no pre-Act obligation relating to intercarrier compensation for ISP-bound traffic and Section 251(g) was simply "a transitional device preserving various LEC duties that antedated the 1996 Act;" and (2) Section 251(g) only applies to services provided to IXCs and ISPs, so it does not apply to LECs' services to other LECs. *Worldcom*, 288 F.3d at 430, 433-434. The *Worldcom*

Court understood and expressly referenced the fact that the *ISP Remand Order*'s interpretation of Section 251(g) involves the FCC's "general authority to regulate the rates and terms in *interstate* telecommunications services…" *Worldcom*, 288 F.3d at 432 (emphasis added). But the *ISP Remand Order*'s emphatic distinction between interstate and intrastate access regimes was left undisturbed and, indeed, the compensation scheme created by the *ISP Remand Order* (applicable to ISP traffic on the basis that it is interstate in nature) was itself left in tact.

In sum, ICF's reliance on the *ISP Remand Order* to support preemption of intrastate access jurisdiction is not only misplaced, but that position is severely undercut by the substantive conclusions within the *ISP Remand Order*. Moreover, the Supreme Court has declined to characterize Section 251(g) as a statute that confers authority upon the FCC. *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 382 (1999). Indeed, the Court explicitly referred to subsection (g) and other provisions within Section 251 as being "not grants of authority at all." *AT&T*, 525 U.S. at 383. Finally regarding Section 251(g), a related provision, Section 601 of the 1996 Act (uncodified), states that the 1996 Act "shall not be construed to modify, impair or supersede Federal, State or local law unless *expressly* so provided." Pub. L. No. 104-104 §601(c)(1), 110 Stat. 56 (1996), 47 U.S.C. §152 note (emphasis added). Section 601 is appended to Section 152(b), the provision that preserves State jurisdiction over intrastate communications, and directly involves application of the AT&T consent decree in concert with the enactment Section 251(g). Those two provisions are inextricably linked and work in tandem. Thus, in the same context of examining the scope of Sections 251(g) and 152(b), Congress has strongly reinforced its intent that the 1996 Act (and the entire Communications Act) should be interpreted to preempt the intrastate authority of State commissions only where Congress itself has expressly done so.

C. The FCC lacks authority to adopt uniform, national rates for reciprocal compensation because Section 252 authorizes State commissions to establish reciprocal compensation rates and requires that those rates be based on cost.

With respect to reciprocal compensation, the 1996 Act clearly: (1) grants State commissions, not the FCC, the responsibility for establishing reciprocal compensation rates; and (2) requires reciprocal compensation rates to be established using a cost-based pricing methodology. Nevertheless, the Missoula Plan proposes to violate both of these statutory requirements by providing for the FCC itself to establish reciprocal compensation rates without reference to cost. This major component of the Plan cannot be accomplished within the existing legal framework.

Section 252(c) provides that the State commission shall "establish any rates for interconnection, services, or network elements according to subsection (d)." 47 U.S.C. § 252(c) (West 2006). First and foremost, Section 252(d) provides that just and reasonable rates shall be "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable)." 47 U.S.C. § 252(d) (West 2006). This

Congressional mandate goes on to set forth more specific test applicable to reciprocal compensation rates:

> [A] State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless –
>
> (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and
>
> (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

47 U.S.C. § 252(d) (West 2006). None of these pricing standards can be met by national, uniform reciprocal compensation rates set by the FCC (as proposed in the Missoula Plan). Indeed, the FCC has long recognized that the Section 252(d) pricing standards cannot be satisfied through an FCC-established national default or proxy rate.

In the *First Report and Order*, the FCC acknowledged that reciprocal compensation rates (1) apply to the exchange of traffic to facilitate local calling, as determined by State commissions; (2) must be established by State commissions; (3) must be based on cost; and (4) cannot be satisfied through a national proxy rate. Specifically, the FCC determined that States have the authority to determine what geographic areas should be considered "local areas" for the purpose of applying reciprocal compensation obligations under Section 251(b)(5). *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act* *of 1996*, CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. August 8, 1996), 11 FCC Rcd. 15,499 at ¶1035 (hereinafter "First Report and Order"). The *First Report and Order* also found that it is the State commissions, not the FCC, that establish the actual rates and have options and flexibility, subject to the statutory pricing methodology. *First Report and Order* at ¶1055. With respect to pricing methodology, the FCC found that the "additional cost" standard in Section 252(d)(2) is functionally equivalent to the forward-looking, economic cost-based pricing standard – TELRIC – established for pricing of UNEs. *First Report and Order* at ¶1054. Finally, when the *First Report and Order* initially adopted interim rates for reciprocal compensation, the FCC made clear that the temporary rates only applied until State commissions determined actual cost-based rates and that true-up mechanisms had to be adopted to ensure that the statutory requirement for cost-based rates was satisfied. *First Report and Order* at ¶¶1065-1067.

The *First Report and Order* was correct in analyzing and applying Section 252's key directives concerning reciprocal compensation rates. For more than a decade, the 1996 Act has been implemented based on that statutory-based approach. In particular, the *First Report and Order* was correct that there is no plausible basis to simultaneously establish a uniform, national rate for reciprocal compensation and satisfy the statutory pricing requirement for cost-based rates.

The FCC cannot change its position on a preemption-related matter without convincingly explaining and justifying the change based on the applicable statute.

NARUC v. FCC, 457 F.3d at 1255-58. Moreover, as the United States Supreme Court has forcefully observed, the 1996 Act is "a scheme in which Congress has broadly extended its law into the field of intrastate telecommunications, but in a few specified areas (ratemaking, interconnection agreements, etc.) has left the *policy implications* of that extension *to be determined by state commissions*, which – *within the broad range of lawful policymaking* left open to administrative agencies – are *beyond federal control*." *AT&T*, 525 U.S. at 385 (emphasis added). Thus, even where the 1996 Act extends into intrastate communications, a distinct role remains for State commissions to apply and implement FCC guidelines, within a *broad range* of lawful policymaking, to establish rates and mediate or arbitrate interconnection agreements, etc. The FCC cannot have it both ways and conclude that access traffic is within Section 251 but somehow it is outside the scope of Section 252's State-driven processes. Even more directly on point, the Supreme Court stated relative to the federal statutory and rulemaking pricing standards that "[i]t is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances." *AT&T*, 525 U.S. at 384.

In sum, the Missoula Plan's proposal for national, uniform reciprocal compensation rates is doubly unlawful by attempting to have the FCC establish the actual rates (instead of State commissions) and by attempting to establish national, uniform rates (instead of cost-based rates). Even aside from the express provisions in Section 252, the Act's general structure and remaining provisions support the conclusion that the FCC lacks authority to implement the Missoula Plan provisions concerning uniform reciprocal compensation rates. Reciprocal compensation rates apply to the exchange of local traffic in support of local telephone service. The same legal argument set forth above in relation to intrastate access charges (Section I.A.) applies equally to reciprocal compensation rates. There is nothing in the 1996 Act supporting the view that the FCC may directly establish national, uniform reciprocal compensation rates. Consequently, the FCC lacks authority to establish uniform reciprocal compensation rates.

D. Even aside from legal/jurisdictional considerations, the FCC has a responsibility to meaningfully preserve the State role over universal service and comprehensively address the impact on local rates in reforming intercarrier compensation.

Reinterpreting Section 251(b)(5) to include toll traffic now would require overhaul of major policies under the 1996 Act including the so-called "trilogy" of local competition orders– *before* Section 251(b)(5) is reinterpreted and reimplemented. Those policies have been implemented for years and constitute the underpinnings of the FCC's implementation of the 1996 Act and all of those policies were designed based on the assumption that Section 251(b)(5) applies only to local traffic. At a minimum, the implementation of sweeping access charge reforms mandates a comprehensive and simultaneous review of universal service policies, given that those policies are inextricably linked to access charge policy and will be significantly impacted by such changes. While the Missoula Plan adds substantial additional funding burdens to the already-stressed Universal Service Fund (mostly through "revenue replacement" opportunities for LECs), there are many unanswered questions relating to universal service (as further discussed below).

Ultimately, there must remain a significant role for State commissions even if the FCC establishes a unified compensation regime applicable to both interstate and intrastate traffic. As a related matter, the Missoula Plan proposes SLC increases that go well beyond the any colorable argument that the SLC would remain a mechanism to recover a fair federal allocation of loop costs; this has the clear effect of impacting rates for local telephone service – a matter that is indisputably within the exclusive control of States. That fact alone should be reason enough for the FCC to not only proceed with caution but with a great deal of cooperation, sensitivity and support for the difficult position in which the FCC's new policy would be placing State commissions. If true reform is to be accomplished, none of the key problems can be ignored; rather, all of them, including reform of the existing Universal Service Fund, must be tackled head on.

In sum, although there may be some practical arguments that could support a broad-based federal policy concerning unified carrier compensation, existing legal constraints prevent the FCC from taking an approach that attempts to holistically exclude State authority. And even from a policy (*i.e.*, non-legal) viewpoint, considerations of uniformity do not alone justify a one-size-fits-all approach to carrier compensation. The FCC's approach in this docket must acknowledge the important relationship between intrastate access charges, local rates and universal service policies. The Ohio Commission urges caution when considering these sweeping carrier compensation reforms and suggests that the FCC cannot adopt any unified compensation system without simultaneously and comprehensively reforming its universal service policies to address the impact of such carrier compensation reform (rather than ignoring those issues or deferring them for future determination).

II. Policy Recommendations

A. Intercarrier compensation reform should be technologically and competitively neutral.

In recent years, the use of new and innovative technologies to carry communications traffic has increased dramatically. Recognizing this, the Ohio Commission has, in prior comments to the FCC, generally advocated that intercarrier compensation requirements be technologically and competitively neutral.[2] *See Developing a Unified Compensation Regime*, CC Docket No. 01-92, Comments of the Public Utilities Commission of Ohio (filed May 23, 2005) (hereinafter "Ohio Comments"). That is, any compensation requirement should apply equally to all providers exchanging traffic, regardless of the network

[2] In those comments the Ohio Commission qualified its support by saying that uniformity, in and of itself, should not be used as a basis for preemption of State authority. Consequently, the Ohio Commission believes that the FCC should strive for technological neutrality, subject to cost, while, at the same time, respecting Congress' design for dual telecommunications jurisdiction.

technology used to originate, transmit, or terminate the traffic, e.g., PSTN, wireless, or packet-based.[3] The Ohio Commission wishes to take this opportunity to reaffirm this belief. Upon its analysis of the Missoula Plan, the Ohio Commission finds the Plan to be neither technologically nor competitively neutral. The Plan, as presented, perpetuates the distinction between providers using different technologies to carry communications traffic and ignores the growing class of providers using packet-based networks to originate and terminate traffic (including ILEC networks). In addition, various provisions of the Plan, such as the ability of a carrier to draw from the Restructure Mechanism and the interconnection rights of CLECs, seem to favor the wireline ILECs at the expense of their competitors, regardless of whether the competitor is a wireline or wireless provider that uses the PSTN or a packet-based competitor. To fully realize effective intercarrrier compensation reform, the Ohio Commission believes that any reform plan must be competitively neutral in terms of the type of carrier and underlying technology being used.

B. The Missoula Plan unnecessarily alters long-established and well-functioning network interconnection practices.

Under Section 251(c)(2)(B) of the Act, an ILEC must allow a requesting

[3] It is worth noting that additional technologies may appear in the future. Whatever rules are developed should be devised so as to be truly technologically neutral, even with regard to technologies that are as-yet unidentified. In addition, as has been demonstrated in the past, decisions in other areas could be applied against intercarrier compensation rules in an attempt to carve out exceptions. The Commission will likely have to remain vigilant for this possibility, or be prepared to periodically revisit the issue of technological neutrality.

telecommunications carrier to interconnect at any technically feasible point. 47 U.S.C. § 251(c)(2)(B) (West 2006). The Ohio Commission notes that pursuant to this section and under existing interconnection agreements, CLECs have the option to interconnect at a single point of interconnection ("POI") per LATA. In earlier comments to the FCC, the Ohio Commission recommended that a minimum of one POI per LATA should be required as a general default rule. *Ohio Comments* at 13. Doing so would retain the existing interconnection requirements including the requirement for meet-point arrangements. In addition, the Ohio Commission recommended that there be a requirement for an additional point(s) of interconnection as traffic to a specific switching/routing point(s) within the LATA exceeds a certain capacity threshold (for example, DS1). *Ohio Comments* at 14. Such a requirement would preserve the existing network resources. In Ohio, there are numerous interconnection agreements that have been filed with the Ohio Commission, which include negotiated terms and conditions for establishing additional POIs based on traffic-threshold criteria. The Ohio Commission continues to believe that carriers/network providers should be able to negotiate a mutually agreed upon location of the POI as well as the details for the establishment of interconnection facilities. Under the current regime of existing interconnection requirements, carriers have been able to establish efficient interconnection arrangements without needing to duplicate the incumbent LEC network.

The Missoula Plan proposes the idea of an "Edge," which is the network location at which a carrier receives traffic to route within its network and terminates traffic received from other carriers. *Missoula Plan* at 45. Under the Plan, an ILEC has the unilateral right to designate the Edge location without regard to the impact on the network of its competitors, the efficient use of network resources, or the associated increase in costs of interconnection to be born by the competitor. *See Missoula Plan* at 45-46. This, in the opinion of the Ohio Commission, is inconsistent with Sections 251(a) and (c)(2) of the Act. The Ohio Commission believes that the Edge concept proposed in the Plan will require the construction of additional uneconomic facilities by all carriers and lead toward a replication of the ILEC network. Additionally, imposing the Edge approach to interconnection has the potential to generate numerous disputes about the hundreds of existing interconnection agreements. This would result in expending unnecessary and avoidable State commission and carrier resources. Above all, the Plan does not provide an explanation for the need to change the existing interconnection standards. These standards have been used by the industry for over 10 years, and have encouraged efficient network use as they have been fine-tuned through actual network implementation and numerous State arbitration proceedings. In short, the Edge concept of interconnection is a solution in search of a problem and should be rejected by the FCC.

The Ohio Commission notes that under the existing interconnection standards, CLECs as well as CMRS providers, typically interconnect indirectly with small ILECs as they establish interconnection agreements with large ILECs and, in turn, send their traffic to the small ILECs through the large ILEC's tandem. As a result, the location of the POI is determined by the CLEC or CMRS provider. The small ILEC has no choice of POI location. Accordingly, as the Ohio Commission recommended in prior comments to the FCC,[4] the FCC should require CLECs, CMRS providers and packet-based network providers to establish with the small ILEC an interconnection arrangement for the transport and termination of traffic before they begin sending traffic to the small ILECs. In addition, the FCC should also require direct interconnection between such carriers and the small ILEC once traffic volumes exceed a mutually agreed-upon threshold. Such a requirement is a simple addition to the existing, well-established interconnection rules set forth in the Act and encourages the efficient use of network resources by all providers. Furthermore, if implemented, this additional requirement would reduce phantom traffic that results from the lack of a business relationship between the traffic-originating carrier and the traffic-terminating carrier without the need to revamp all other interconnection requirements.

The Ohio Commission believes that the Missoula Plan, as presented, fails to address one of the critical issues facing the telecommunications industry today in a competitively and technologically neutral manner, namely the transport and termination of packet-based traffic. Telecommunications providers are increasingly

[4] *See Ohio Comments* at 15.

using packet technology in their networks. The Ohio Commission urges the FCC to adopt a policy obligating VoIP providers to pay other telecommunications providers for the transport and termination of traffic originated by the VoIP providers as well as entitling VoIP providers to be compensated for the use of their network for transport and termination of traffic. Such a policy would also reduce the phantom traffic problem that results from the lack of a business relationship between VoIP providers and other telecommunications carriers.

C. The Missoula Plan needlessly divorces compensation from cost.

The supporters of the Missoula Plan claim that, if implemented, the Plan will result in all intercarrier compensation rates for all types of traffic being moved closer together. *Missoula Plan* at 4. In doing so, the Plan sets a single rate for all carriers – Tracks 1, 2, and 3 – regardless of the actual costs they incur. The Ohio Commission believes that this aspect of the Plan violates Section 252(d)(2) of the Act.

As interconnecting network providers engage in negotiating the location and the number of POI(s), it is the Ohio Commission's belief that cost-based compensation arrangements will offer incentives for the efficient use of network resources and will eliminate the cross-subsidization between competitive carriers. With the assurance that they will recover the costs of building their networks, network providers will have a greater incentive to invest in maintaining their network as well as to perform upgrades in both urban and rural areas. This would benefit the customers of all providers regardless of the underlying technology used by a given provider.

The implementation of a single cost-based compensation rate for individual carriers will require a period of transition. Furthermore, the Ohio Commission wishes to point out that the impact of the resulting compensation rate reduction will differ among carriers, e.g., large vs. small, and among States as States are at different stages in reducing their intrastate access rates. The Ohio Commission has a long established policy of mirroring interstate access rates on the intrastate side for ILECs and caps the intrastate access rates of CLECs at the intrastate access rate of the ILEC in whose territory they compete. Therefore, it is necessary that States have differing transition periods to allow for all of the issues resulting from the reduction to be properly assessed and addressed in each respective State. The Ohio Commission believes that this approach will greatly reduce the need, if there is any need at all, to increase the Universal Service Fund and SLC, as proposed in the Plan.[5]

Under the Missoula Plan, an allowance is not made for mutual and reciprocal recovery on the basis of the "additional costs" of terminating a call by a carrier. *See Missoula Plan* at 8-9. The Ohio Commission submits that any unified compensation

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[5] The Missoula Plan discusses the need to change existing Universal Service mechanisms. *See Missoula Plan* at 77-79. According to the National Regulatory Research Institute ("NRRI"), "the Plan will modify the existing USF mechanisms to recover some carriers' potential revenue loss due to the increased SLC and adjusted access and reciprocal compensation charges." National Regulatory Research Institute, *Commissioner Briefing Paper: Intercarrier Compensation and the Missoula Plan*, Ed Rosenberg, Lilia Perez-Chavolla, & Jing Liu, Page 52 (August 11, 2006) (hereinafter "NRRI").

regime not allowing for such recovery is inconsistent with Section 252(d)(2) of the Act. Cost-based compensation provides fair compensation to all network providers and always satisfies the statutory pricing standard, i.e. "additional cost," found in Section 252(d)(2)(A), even when traffic is not in balance between carriers. *See* 47 U.S.C. § 252(d)(2)(A) (West 2006). Under the Plan, however, providers such as Track 1 CLECs will bear a disproportionate revenue shortfall when compared with providers such as Track 2 and Track 3 ILECs. Consequently, CLECs would be put at a competitive disadvantage with competing Track 2 and Track 3 network providers, regardless of the cost recovery method for such a revenue shortfall.

In addressing the impact of access rate restructuring on IXC competition in rural service areas, the Ohio Commission strongly believes that adopting a cost-based compensation regime will encourage such competition in rural areas. Such a cost-based compensation regime would allow IXCs to market their services to more rural areas while complying with rate averaging and rate integration requirements.

The Ohio Commission believes that any compensation arrangement should recover only traffic-sensitive costs of the network and should be equally applied to comparable components, i.e., components performing comparable functions, of differing networks using different underlying technologies. Accordingly, compensation arrangements should only recover traffic-sensitive costs of the PSTN, wireless networks, and packet-based networks with traffic-sensitive costs being defined as costs for a portion of the network that vary with the usage of the network. To the extent possible, rate structures should also be similar for comparable components of differing networks using different technologies. The traffic-sensitive components of different network technologies, *i.e.*, PSTN, wireless and packet-based, and different network architectures, *i.e.*, ILEC vs. CLEC, that are subject to compensation should be more precisely identified by the FCC. Such cost-based compensation rates should be based on an individual carrier's costs to satisfy the requirements of Section 252(d)(2) of the Act. If cost justification demonstrates that a carrier's traffic-sensitive costs (or cost components) of a specific network are higher than costs for comparable components of other networks, the carrier should be permitted to charge higher rates for the comparable functions of other networks. If a carrier, be it a small ILEC, CLEC, CMRS or provider using packet-based network, is not able to conduct a cost study, it should be given the option of mirroring the rates of a carrier with which it exchanges traffic, subject to the restriction of comparable functionality. The Ohio Commission believes that such an approach is superior to the approach set forth in the Missoula Plan, which forces a single rate on all Track 1 carriers regardless of their costs and network structure. The Plan's approach will discourage efficient facilities-based providers from investing in more advanced networks since they are not guaranteed the recovery of their costs. The Ohio Commission would also point out that the Plan's proposed final unified, albeit unjustified, rate of $0.0005 for Track 1 carriers is significantly below TELRIC-based reciprocal compensation rates established in Ohio for two of the largest carriers, AT&T Ohio ($0.004697) and Cincinnati Bell Telephone Company (over $0.003429).[6]

The Ohio Commission strongly believes that any intercarrier compensation reform should implement a rate structure that is based on bandwidth for "transport" facilities and on a flat-rated per port (line) for "termination" (switching/routing) functionality for all network technologies. Due to the increasing amount of packet-switched and broadband traffic, the Ohio Commission recommends that the flat-rated, per port (line) charge be based on the line capacity, e.g., DS1 port, DS3 port, etc. The methodology used in determining the "cost" should be the TELRIC standard. The familiarity of the industry with the TELRIC standard would provide a level of certainty to all participants.

D. The Missoula Plan creates inequities between Track 1 ILECs and CLECs.

The Missoula Plan allows for an increase in the subscriber line charge ("SLC") over a series of four steps. *Missoula Plan* at 1. SLCs for Track 1 carriers will be capped at $10.00 for all lines at the end of the fourth Step. *Missoula Plan* at 20. Track 2 carriers will have SLCs capped at $8.75 and $10.00 for primary residential/single line business customers and multi-line business customers respectively at the end of the third Step. *Missoula Plan* at 20-21. The SLCs for Track 3 carriers will be capped at $8.75 and $9.20 for primary residential/single-

[6] TELRIC rates for AT&T Ohio and Cincinnati Bell Telephone Company were established in case numbers 02-1280-TP-UNC and 96-899-TP-UNC, respectively.

line business customers and multi-line business customers respectively at the end of the third step. *Missoula Plan* at 20-21. With the exception of Track 3 multi-line business customers, all consumers will face a potential SLC increase of at least $.80. The largest of the SLC increases, though, will be in the range of $2.25 to $3.50 and will be absorbed by residential and single line business customers. There is nothing apparent in the Plan, however, requiring that the increase in the SLC, which under the Plan is intended to recover lost access revenues, relate to the actual access cost that is not recovered for a given line, or even in a given service area. By not requiring a correlation between actual access cost that is not recovered and the corresponding increase in the SLC, the Plan allows companies to selectively increase their SLCs where it is economically feasible to do so and not increase the SLC in other service areas. In other words, a company providing service in many areas, some subject to competition, some not, may avoid increasing the SLC in those areas where doing so would be detrimental for competitive reasons. At the same time, this company may increase the SLC as much as needed, up to the cap, in non-competitive areas to make up the difference. In doing so, a pocket or hole, i.e., a "donut hole," is created where the SLC is not increased, while in surrounding areas it is.

For obvious reasons, the ability to create these "donut holes" will provide a tremendous competitive advantage for some companies and be a competitive detriment to others. CLECs, by definition, are carriers who face competition in all areas that they offer service. If a CLEC loses access revenue under the Missoula Plan and wishes to recover this revenue, it may do so through the mechanism provided by the Plan, which is an increase in the SLC. Consequently, a CLEC must either increase the SLC to its customers, which as explained above, is significant for residential and single line business customers, or, in the alternative, either absorb the lost access revenue as a new "cost of business," or raise customer rates. An ILEC offering service in many areas, clearly has an advantage in that it will not likely have to decide between raising the SLC for its customers and losing access revenue. In fact, this feature of the Plan actually allows ILECs in this position to use the SLC as a means to better compete on price. Under the Plan, an ILEC may make a competitive decision – one that a CLEC may not likely make – to abstain from raising its SLC in a given competitive area knowing that it may raise the SLC to the maximum in a different, non-competitive area. If this were not enough, the Plan also establishes a built-in safety valve known as the Restructure Mechanism. *Missoula Plan* at 1. The Restructure Mechanism allows companies to dip into a fund to recover lost access revenue not recovered through the increased SLC. *Missoula Plan* at 1. Although the Plan assumes that a company taking advantage of the Restructure Mechanism has increased its SLC to the maximum allowed under the Plan,[7] the fact that the SLC increase does not have to bear any correlation to actual lost access revenue makes this assumption rather meaningless.

[7] *Missoula Plan* at 64.

The competitive disparity between large ILECs and their competitors that is created by "donut holes" is a fundamental flaw in the Plan. The Ohio Commission believes that such disparity must be excluded from any intercarrier compensation reform plan that may be adopted and recommends requiring a correlation between actual access costs that are not recovered for a given service area and any revenue recovery mechanism for the same service area. Requiring such a correlation would eliminate a company's ability to use the SLC (or other cost recovery mechanism) increases that exceed actual access cost for a given service area as a means to offset lost access revenue in a different service area that is not being recovered through increases for competitive pricing reasons. ILECs and CLECs will be equally able to recover actual access cost through increased SLCs only if this disparity is eliminated.

E. Benefits, burdens, and risk are not equitably distributed under the Missoula Plan.

From a policy standpoint, the question must be asked, as it should with any intercarrier compensation reform proposal, who will win and who will lose under the Missoula Plan? The Ohio Commission believes that, as a matter of policy, any reform plan should equitably spread the benefits and burdens of the plan among all stakeholders. Unfortunately, the Missoula Plan fails to do that.

Under the Missoula Plan, Track 1 ILECs are exposed to the least risk. The Plan covers Track 1 ILECs as both a payor and payee of access charges. The Plan allows these carriers to reap the benefit of reduced costs through a lower terminating access rate for calls that it terminates on another carriers network, yet sets forth no requirement that any of the realized savings be in any way passed on to consumers. *See Missoula Plan*, Exhibit 2 at 2, *Economic Benefits from Missoula Plan Reform of Intercarrier Compensation*, Richard N. Clark and Thomas J. Makarewicz, July 18, 2006 (hereinafter "Missoula Plan Exhibit 2"). At the same time, the Plan allows these Track 1 ILECs to increase the SLC to recover any lost access revenue for terminating the calls of other carriers on their networks. *Missoula Plan* at 19. These carriers are further indemnified against any revenue loss through the Restructure Mechanism. *Missoula Plan* at 63. On one side of the equation, then, Track 1 ILECs receive the benefit of reduced costs, while on the other side, they do not risk any decrease in revenue, nor do they have to offset this revenue against their cost savings. This design element of the Plan is especially beneficial to those companies that own both a large Track 1 ILEC and a large IXC. Such companies will benefit from the cost savings realized by both their ILEC and IXC, yet they will be able to maintain ILEC revenues through an increase in the SLC and the ability to tap into the Recovery Mechanism.

Under the Missoula Plan, carriers other than large ILECs are also placed into Track 1. These include CLECs, wireless providers, and other non-rural carriers. *See Missoula Plan* at 4-5. These carriers, however, do not fare as well under the Plan as do the large Track 1 ILECs. While the ILECs are protected on both sides of the access charge reform equation, that is not necessarily the case with the other Track 1 carriers. As noted earlier, CLECs, wireless, and most other carriers are, by definition, subject to competition in every area they serve. As a result, they are unable to create "donut hole" structures in their market areas and it is likely that they will be unable to use the SLC or other price increases to offset the loss in access revenue, let alone to generate a windfall. The only offset they will have is the reduction in costs. Additionally, these competitive carriers have no "restructuring mechanism" or any other form of revenue maintenance to rely on under the Plan. *See, generally, Missoula Plan*.

Under the Missoula Plan, consumers would purportedly reap the benefits of the Plan's reforms;[8] however, a review of the details of the Plan reveals that certain groups or classes of consumers will fare far better than others under the Missoula Plan. In *Exhibit 2* to the Missoula Plan, the Plan's analysts calculated the expected aggregate benefits of the Plan for consumers. *Missoula Plan Exhibit 2* at 4. The authors predict that there will be $3.36B of consumer surplus benefit per year,[9] i.e., the consumer surplus minus the incremental increase in the SLC and

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[8] *See* The Missoula Plan Supporters, *Letter to Task Force on Intercarrier Compensation Chairman Ray Baum*, July 18, 2006. In this letter, the supporters of the Plan state that under the Plan, "[T]he winners will be consumers and the economy as a whole."

[9] The calculation of a $3.36B consumer surplus was based on three assumptions: 1) 100% flow through dollar for dollar of access charge reductions to consumers through lower long distance rates; 2) A price elasticity of demand of -0.72 is a widely used standard, but it is based on 2002 industry data.; and, 3) The cost of the Missoula Plan to consumers in SLC and USF would be about $1.5B. The Ohio Commission believes that while some of these assumptions may be a reasonable initial starting point for the economic analysis, the results of the analysis are sensitive to the relevance and accuracy of these important baseline factors. For example, the choice they made for price elasticity of demand was expedient but it may not be relevant today due to the changes in the industry since 2002. As a consequence of those changes, the industry demand curve may be less price elastic today, which would yield a smaller consumer surplus. Nor is there is any

USF, accruing to consumers by the fourth year of the plan. *Missoula Plan Exhibit 2* at 4.

In their consumer benefits study, AT&T's analysts assume that the cost savings to the IXCs will be flowed though 100% to consumers and that the price elasticity of demand for wireline toll is -0.72, a figure reported as midrange for the wireline toll telephone industry in 2002. *Missoula Plan Exhibit 2* at 2. According to their analysis, the total consumer surplus of $3.36 billion per year (net of flat rate increases in the SLC and USF) will translate to an incremental average benefit of $2.63 per *household* per month. *Missoula Plan Exhibit 2* at 4.

While the analysis performed by the Plan's supporters demonstrates an average household benefit per month, the analysis suggests that they calculated this benefit by spreading the aggregate consumer surplus, i.e., including both household and business benefits, over the total number of households. *See Missoula Plan Exhibit 2* at 12, Figure 2. Doing so implies that the entire consumer surplus, or the benefit of the reduced access charges and the increased value to consumers of lower long distance rates will benefit "households." This does not appear to be the case, however. High volume users, who are not likely to be average households, would accrue proportionally the greatest benefit from the consumer surplus. The

guarantee or requirement that the reduced access charges will flow through to lower consumer rates. Market forces would, arguably, pressure the Interexchange carriers to flow through the reduced access charges. But there are no guarantees about how much or when consumers will see any of the projected consumer surplus; whereas, the ILECs will recover higher SLC rates, and the Restructure Mechanism will virtually guarantee to compensate the Track 1 ILECs for revenues shortfalls not recovered through SLC increases, and to recover any additional costs incurred to implement the Plan.

consumers likely to benefit the most under the Plan, then, are high volume users of long distance minutes with a relatively low number of access lines. These consumers are likely to be more attractive to long distance service providers and, therefore, are more likely to actually benefit from any pass-through of the access savings as carriers attempt to lure their business. Consumers who use more than 244 minutes of long distance per month[10] will benefit from reductions in long distance rates, to the extent reductions in access charges are flowed through to long distance rates, as the AT&T analysts predict. With a relatively high ratio of usage to lines, these consumers are also likely to benefit from the Plan's shifting universal service funding from minutes of use to numbers. Consequently, consumers such as telemarketers and FAX SPAM purveyors would do very well under the Plan. Furthermore, since these consumers are multi-line business customers, they will have to absorb the least amount of the SLC increase that will likely be imposed by the LEC to recover lost access revenue.

On the lowest rung on the economic ladder are consumers who receive Lifeline support to assist with their telephone bills. These consumers will also benefit under the Plan since the support to Lifeline will be maintained at current levels while, at the same time, they may benefit from a possible reduction in their long distance rates. *See Missoula Plan Exhibit 2* at 4-5. As a result, consumers who fall into this category, i.e., Lifeline consumers, will not likely be adversely

[10] *NRRI* at 65.

affected by the Plan.

The consumers who are likely not to fare well under the Missoula Plan are those who have a low ratio of long distance minutes-of-use to lines. These consumers will likely not be as attractive to carriers as the high volume consumers and, therefore, it is unlikely that much, if any, of the access savings will be passed through to them as an incentive. The Plan's shifting of universal service funding from minutes-of-use to numbers[11] may not be as onerous to this group of consumers since they are low-volume users who would be currently paying little into the Universal Service Fund. Nonetheless, they are likely to get an increase in their contributions to the fund. Since many consumers in this category are single-line residential and business customers, they will also absorb the lion's share of the SLC increase that is permitted under the Plan. *See Missoula Plan* at 20-21. Furthermore, with the proliferation of nationwide wireless calling plans, the number of consumers who are low-volume or even "no-volume" consumers who will be affected by the change proposed in the Plan is likely growing. The consumer segment that is likely to be adversely affected by the Plan is that segment that makes less then 244 minutes of long distance calls per month and is just out of reach to qualify for Lifeline, yet will be required under the Plan to pay a higher SLC.

[11] *See Missoula Plan Exhibit 2* at 1. The shift from minutes of use to numbers is implicitly referenced as the exhibit discusses the perceived increase in wireline consumer welfare that is achieved by "reducing the current-levels of per minute access charges and replacing any revenue with increases in flat-rate per-month charges.

The Ohio Commission recognizes that any reform plan will affect different groups of consumers in different ways. One feature of a given plan may benefit one group while it does not benefit another; it may burden one group, while it does not burden another. As a policy matter, though, the Ohio Commission believes that the benefits and burdens of any plan should be distributed as equitably as possible. Unfortunately, the Missoula Plan fails to do this. Under the Plan, those who will benefit the least, yet be burdened the most, are those most unable to afford it.

Not surprisingly, the effects and risks of the Plan on consumers are considerably different than they are on the supporters of the plan. Consumers will pay higher SLC and USF charges. The ILECs will reduce their access charges and recover the lost revenues from higher SLCs directly from consumers. In addition, the ILECs can tap into the Restructure Mechanism for any unrecovered costs. Although it is not clear in the Plan, it is likely that funding the Restructure Mechanism and any further costs will be funded by additional surcharges on consumers. Such additional increases will further diminish the prospect for any consumer surplus. In fact, it will reduce benefits to households, and will shift the benefits upward to higher volume users, if there is any consumer benefit left at all. The uncertainties and the risk of implementing the Plan are ultimately born by consumers. Consequently, the Ohio Commission strongly recommends that the FCC adopt reforms that are designed to equitably distribute the benefits and burdens among all of the stakeholders. To accomplish this, the Ohio Commission again suggests that any reform approved by the FCC that includes an increase in the SLC should also include a requirement that the SLC increase correlate to actual access cost that is not recovered on a per-line basis. Furthermore, any realized savings from reduced access charges should be equitably passed through to consumers to help offset any increase in the SLC.

F. The Missoula Plan needlessly and inappropriately changes the nature of the SLC

As noted above, the SLC was instituted as a means for the consumer to pay his or her "fair share of the loop," and, as noted above, was traditionally estimated at 25% of the loop cost. The Missoula Plan, however, completely redefines the purpose of the SLC. If the SLC is still intended to recover a consumer's "fair share of the loop," then, as previously noted, the cost of a loop is now approximately $40.00 per month under the Plan. The fallacy in this assertion is demonstrated by looking at TELRIC rates.[12] The obvious distortion in the SLC leads to but one conclusion: under the Missoula Plan, the SLC is no longer a means for the consumer to pay his or her "fair share," but instead, has become a source of revenue maintenance for, primarily, Track 1 ILECs. This was not, in the opinion of the Ohio Commission, the intended evolution of the SLC. Rather, as the cost of the loop increases, the monthly SLC paid by consumers should increase proportionately allowing companies to receive no more than a "fair share" from their customers.

[12] Cases 02-1280-TP-UNC and 96-899-TP-UNC established that the TELRIC cost of the local loop for AT&T Ohio and Cincinnati Bell Telephone Company, respectively, were much less than the cost of the local loop that one logically has to assume under the reasoning of the Missoula Plan.

G. The Early Adopter Fund is a needless and exclusionary incentive.

The Missoula Plan assumes that the FCC will establish an "Early Adopter Fund" ("EAF") for those States in which carriers have already reduced their intrastate access rates prior to the adoption of the Plan. *Missoula Plan* at 76-77. This inducement for States to adopt the Plan would provide for the recovery a portion of the State universal service fund used to compensate carriers who have reduced their intrastate rates prior to the adoption of the Plan. *See Missoula Plan* at 76-77. The Ohio Commission believes the EAF is a bad idea and bad policy that should not be included in any intercarrier compensation reform proposal.

Since 1984, Ohio has instituted intercarrier compensation reforms that would likely qualify the State for inclusion in the Missoula Plan's EAF.[13] The Ohio Commission undertook the reforms instituted in Ohio without any inducement such

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[13] The Ohio Commission has generally required ILECs to mirror their federal access rate structure when setting their intrastate access rates. *See Intrastate Access Charges,* Case No. 83-464-TP-COI, Subfile C (May 21, 1984 and March 12, 1987). In January, 2001, the four largest ILECs in Ohio were required to mirror the access rates and access rate reductions contained in the FCC's CALLS decision. *See Modification of Intrastate Access,* Case No. 00-127-TP-COI, Opinion and Order (January 11, 2001) (hereinafter "January 11 Opinion and Order"). Two of these ILECs, Sprint-United (now Embarq) and Verizon, asserted that these reforms would have a multi-million dollar impact on each company. *See Modification of Intrastate Access,* Case No. 00-127-TP-COI., Sprint Supplemental Impact Statement (June 1, 2001) and Verizon Statement of Overall Company-Wide Impact (July 19, 2001). As a consequence, the Ohio Commission permitted through stipulated agreements to allow each company to assess consumers a monthly surcharge to offset this loss in revenue. *See Modification of Intrastate Access,* Case No. 00-127-TP-COI, Opinion and Order (June 28, 2001) and Opinion and Order (July 19, 2001). In addition to these access reforms, the Ohio Commission capped the intrastate access rates of CLECs at the ILEC's intrastate access rates as of June 30, 2000, unless justifying and receiving approval for a higher rate from the Ohio Commission, and required the four largest IXCs (at that time) to flow-through to consumers the savings from reductions in intrastate access rates. *See January 11 Opinion and Order*.

as the EAF being proposed by the Plan, and believes that these reforms have been beneficial to carriers and consumers alike. If reductions in intrastate access rates serve the public good, then the question must be asked, why should a State be rewarded for instituting what is purportedly sound public policy? The EAF is the Plan's equivalent of rewarding a child for brushing his teeth – it is something he should do *without* being rewarded. Likewise, States should not be rewarded for doing what they should already have done as a matter of policy.

While the Ohio Commission believes that the EAF is a bad idea built upon bad policy, it is nonetheless clear that Ohio has taken steps that should qualify it for the EAF, and suspects that other States have done likewise. Ohio does not, however, have a State universal service fund. As such, the Ohio Commission fails to see how Ohio, and other States without a universal service fund, will benefit from the Plan's EAF. Furthermore, it is not clear under the Plan how the EAF will be funded. *See Missoula Plan* at 76-77. If the EAF is ultimately funded by the consumers of all States, then the inducement intended by the Plan will most certainly be perceived as a liability by those States with no State universal service fund. From a functional standpoint, then, the mechanics of the EAF must be such that all States that have reduced their intrastate access rates prior to the Plan's adoption be able to participate in the EAF without regard to whether or not a State has a State universal service fund. In the alternative, support for the EAF must be required of only those States that can draw from the EAF, i.e., those States that have a State universal service fund. Finally, in both States with a State universal fund as well as States such as Ohio that have offset lost access revenue through some other mechanism, there must be an assurance that consumers – not just carriers – see a benefit from the reduction in intrastate access rates.

H. State Participation in the Missoula Plan is coercive.

In theory, the Missoula Plan leaves some discretion to the States with regard to their participation in the Plan. *See Missoula Plan* at 3. Nonetheless, a careful review of the fine print reveals the coercive nature of the Plan. Although, Step 1 implementation of the Plan's intrastate originating access rates is voluntary for Track 1 and Track 2 carriers, if a State chooses not to participate, consumers in that State will still experience the Plan's SLC increases. *Missoula Plan* at 3. Access rates will not decline in those States, so consumers in States not opting into Step 1 implementation are subjected to increases in their monthly SLC without the possibility of seeing any reduction in their access rates. Furthermore, since the Plan does not set forth how the Restructure Mechanism is to be funded, there is a significant risk that these same consumers will be paying a monthly surcharge to help fund the Restructure Mechanism for use in other States. Customers of Track 3 carriers fare better than their Track 1 and Track 2 counterparts in that their SLCs will remain constant whether or not their respective States opt into all parts of the Plan. Furthermore, in Ohio at least, the intrastate originating and terminating access rates of small Track 3 LECs already mirror their interstate originating and terminating rates, so they will not be denied the reduction in access rates as Track 1 and Track 2 carriers would be under the Plan. Finally, and in the opinion of the Ohio Commission, the most justifiable consequence of not opting into the entire Plan, States that do not "voluntarily" adopt the Plan in its entirety will not receive any payments from the Early Adopter Fund. *See Missoula Plan* at 77. Nonetheless, since the Plan is not clear how this particular incentive will be funded, there is the risk that consumers who receive no benefit from the fund will find themselves forced into supporting it.

It is the belief of the Ohio Commission that, while certain parts of the Missoula Plan are "voluntary" in name, the Plan is crafted in such a manner as to coerce States into opting into all aspects of the Plan through the imposition of what are tantamount to penalties for failing to do so. The coercive nature of the Plan conjures images from the schoolyard in which the playground bully liberally gives those weaker than himself the unenviable choice of surrendering to him their lunch money or receiving a punch in the nose. Likewise, States are given much the same choice – opt into all aspects of the Plan, or accept the near certainty of higher monthly rates for consumers. Opting into all aspects of the Plan, however, is no guarantee that a State will fare well. Since most access lines belong to Track 1 carriers,[14] the majority of residential customers in any given State will likely see a

[14] *See Missoula Plan* at 1. According to the Plan, Track 1 "roughly, includes the lines of all RBOCs, CLECs, wireless providers, and other non-rural carriers and covers 146.2 ILEC loops." The Plan further states that there are 12.5 Track 2 ILEC loops and 7.3 million Track 3 ILEC loops.

higher monthly bill. There will likely be States that adopt early to take advantage of the EAF, counting on the benefits that it promises. If, however, the Plan is not approved by the FCC, these States may well have initiated intrastate access reforms that were to be funded, at least in part, by the EAF, yet will find themselves not receiving the incentives promised by the Plan. The coercive nature of the Plan begs the question: if there needs to be this kind of "incentive" to encourage State participation, how good can the Plan be for the States and consumers?

I. The Missoula Plan's transit traffic proposal is unduly restrictive and creates a windfall for the ILECs.

Transit traffic occurs when two carriers that are not directly interconnected exchange traffic by routing such traffic through a third, intermediate carrier. To promote a uniform, seamless telecommunications system, the Ohio Commission believes that carrying transit traffic should be an obligation of all carriers. The Missoula Plan recognizes this as well and requires that any ILEC carrying transit traffic on the eve of the Plan's implementation, i.e., Step 1, to continue to carrying such traffic under the Plan. *Missoula Plan* at 49.

Small carriers are in a unique position with regard to transit traffic because they do not always receive the necessary billing information from the transit carrier required to bill the originating carrier for traffic that it terminates on their network. The Ohio Commission has previously noted in comments to the FCC that this issue has been and should be negotiated and, if necessary, arbitrated among and between carriers to resolve this issue. *Ohio Comments* at 28-29. Nonetheless, the Ohio Commission commends the Plan for taking a positive step toward the elimination of such "phantom traffic" in that the Plan requires transit traffic carriers to pass on, without alteration, the telephone number contained in the billing information it receives from the originating carrier or another transit carrier. *Missoula Plan* at 56. If such a requirement is enforced and transit carriers provide such required information, the Ohio Commission believes that the problem of phantom traffic would be largely eliminated. Consequently, the Ohio Commission supports this requirement of the Plan; however, the Ohio Commission believes that this requirement is not an integral part of the Plan and can be independently adapted as a modification of the existing, well-established interconnection rules.

The Ohio Commission is troubled by the mechanism proposed in the Plan for the compensation of transit traffic. Like other types of intercarrier compensation, compensation for the routing of transit traffic should be done using a cost-based rate. Unfortunately, the Plan does not have such a requirement. Instead, at Step 2 of the Plan, the rate for carrying transit traffic will be subject to a commercial agreement, which includes a cap. *Missoula Plan* at 51. At Step 4, however, the cap is lifted for transit service within a metropolitan statistical area. *Missoula Plan* at 52. Moving further under the Plan, at Step 5 the rate will increase annually based on the rate of inflation. *Missoula Plan* at 51. Furthermore, at this point, a minute of use ("MOU") restriction is imposed with a threshold of 400,000 minutes. An ordering carrier that exceeds this cap may face a rate that is two times the applicable rate at the time. *See Missoula Plan* at 51-53.

The Ohio Commission believes that the approach adopted by the Plan will have negative implications for telephone competition because competitors often must rely on transit providers to get their traffic to its destination. In many instances, and for many competitive carriers, the transit provider is the ILEC. Under the Plan, competitive carriers who must rely on the ILEC to deliver their traffic may be subjected, if they exceed the MOU threshold, to punitive transit rates that have no basis in the cost actually incurred by the ILEC in providing the transit service. *Missoula Plan* at 52. For large competitive carriers this is almost a certainty, since they will likely exceed the 400,000 minutes allotted under the Plan. This will have a chilling effect on competition and should not be adopted under any plan for intercarrier compensation reform.

J. The Missoula Plan further burdens numbering resources.

The Ohio Commission is concerned about the effect the Missoula Plan, if implemented without modification, would have on numbering resources. Under the Plan, the NPA/NXXs of the calling and called parties are used to determine whether or not a call is local or toll for purposes of intercarrier compensation. *See Missoula Plan* at 25-26. To qualify for terminating reciprocal compensation the telephone number of the calling party and the telephone number of the called party must be associated with rate centers that are in the same local calling area. *See Missoula Plan* at 26. Under such a classification system, there is an incentive for carriers to obtain telephone numbers in each ILEC's local calling area, without regard to the carrier's actual and immediate need for the numbers.

Under the Plan, competitive carriers have an incentive to obtain telephone numbers associated with rural rate centers to be eligible for reciprocal compensation rather than be subject to the higher access rates they would otherwise be assessed. *Missoula Plan* at 26-27. To further complicate matters, most rural areas are not pooling their numbering resources. *See Number Resource Optimization*, CC Docket No. 99-200, Order and Fifth Further Notice of Proposed Rulemaking, FCC 06-14 (rel. Feb. 24, 2006) at ¶12. While unintended, the effect of this requirement is that carriers are likely to request and receive, in areas without numbering resource pooling, full blocks of 10,000 telephone numbers, whether or not they have any significant local presence in the rate center. These requests would likely drain available numbering resources, especially in those States not granted authority to implement mandatory thousands-block number pooling.

K. The Missoula Plan addresses the commercial mobile radio service phantom traffic issue, but does not go far enough in addressing other commercial mobile radio service/intercarrier compensation issues.

Commercial Mobile Radio Service ("CMRS") providers raise a unique set of issues where intercarrier compensation is concerned. In the past, the FCC has sought and the Ohio Commission has provided comments pertaining to intercarrier compensation involving CMRS providers*. See, generally, Ohio Comments*.

The FCC has previously recognized the problem of CMRS providers and phantom traffic, *i.e.*, traffic terminated without adequate billing information from the originating and/or transit carrier, that exists when a CMRS sends traffic through a tandem where there is no interconnection agreement or other compensation arrangement in place between the originating and terminating carriers. *FNPRM* at ¶¶139-140. The Ohio Commission supports the Missoula Plan's approach for addressing this problem for CMRS and other traffic through the Plan's requirement that the identifying telephone number and/or signaling information of the calling party be passed on to the terminating carrier by the transit traffic carrier. *See Missoula Plan* at 56. The Ohio Commission did not agree with the FCC's previous assertion that there may be a need for national terms or a master interconnection agreement to address the phantom traffic problem. The Ohio Commission applauds the Plan for avoiding this approach. *Missoula Plan* at 56. Under the Plan, carriers may establish an interim interconnection agreement while in the process of negotiating a permanent agreement pursuant to Section 252 of the Act. *Missoula Plan* at 54-55. While carriers may presently follow this same approach under the Commission's T-Mobile Order,[15] the Ohio Commission believes

[15] *Developing a Unified Intercarrier Compensation Regime/T-Mobil et. al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, CC Docket No. 01-92, Declaratory Ruling and Report and Order, FCC 05-42 (rel. Feb. 24, 2005), 20 FCC Rcd 4855 (2005).

that it is important to incorporate into any intercarrier compensation plan the obligation of interconnecting parties so as to avoid the exchange of traffic without compensation.

The Missoula Plan purports to establish a unified regime for intercarrier compensation, yet maintains the CMRS Metropolitan Trading Area carve-out for CMRS traffic, which removes it from any uniformity established under the Plan. *Missoula Plan* at 28-30. A fully unified regime of intercarrier compensation would require eliminating this existing CMRS carve-out from other LEC originated traffic. This can be achieved, as previously noted in these comments, by implementing a cost-based compensation rate for individual carriers, which treats each minute of use the same, without regard to whether it is local, toll, ISP-bound, etc., in nature. If, however, the FCC does not eliminate this carve-out as adopted in the Plan, the Ohio Commission encourages the FCC to adopt the wireline local calling area as the appropriate geographic scope to determine when traffic is subject to reciprocal compensation. By doing so, the FCC will put CMRS and wireline traffic on an equal footing for determining whether traffic is subject to reciprocal compensation.

The FCC has previously noted that with regard to CMRS traffic, it is standard industry practice, particularly among larger LECs, to compare the NPA/NXX code of the calling and called party to determine proper rating and compensation for the call. According to the FCC, CMRS providers claim that this allows LECs to "game the system" by routing a CMRS local call to an IXC. *FNPRM* at ¶¶141-143. The Ohio Commission believes that the Missoula Plan does not adequately address this concern because it continues to use the NPA/NXX to determine the appropriate rate for a given call. Indeed, it further exacerbates the problem by requiring that NPA/NXXs rather than geographic end points be used exclusively to determine the appropriate form of intercarrier compensation for all calls. Furthermore, while the Plan purports to create a unified regime of intercarrier compensation that would eliminate this incentive, it does not really do so. Under the Plan, Tracks 1 and 2 do not immediately have a unified rate and Track 3 never has a unified rate. As traffic distinctions, i.e., local v. toll, continue to exist, so does the incentive for arbitrage continues to exist.

By not adopting the use of the geographic end points of a call for the determination of the appropriate compensation, the Plan allows the perpetuation of the "virtual NXX" problem. By using the NPA/NXX to rate calls without taking into account geographic location, carriers have an incentive to obtain numbers that appear to be local when, in fact, the actual physical connection of the call is non-local. A truly unified intercarrier compensation regime would eliminate this problem; however, if it is necessary to define boundaries for reciprocal compensation purposes, the Ohio Commission recommends that the geographic end points, based on the wireline LECs local calling area, be used to do so

The exclusive use of numbers, rather than physical location, for the determination of jurisdiction and compensation for all traffic actually creates an opportunity for uneconomic arbitrage. This has impacts on numbering resources (discussed elsewhere), but will also create severe distortions in the intercarrier compensation system. Replacing a flawed system with one that further perpetuates old flaws, is not an improvement.

L. Intercarrier compensation reform is necessary, but should be undertaken through a more gradual, incremental, and truly balanced approach than that proposed in the Missoula Plan.

The Ohio Commission agrees with the Plan's supporters that reform is needed, but believes that it should be done in a more measured and balanced manner than that proposed in the Missoula Plan. The Missoula Plan, as presented, is unbalanced, front-loaded and open-ended.

As has been discussed elsewhere, the Plan provides opportunities for both significant windfalls and guaranteed revenues for certain segments of the telecommunications market. In a truly competitive market, there may be incidental windfalls from time to time as a market adjusts to changing conditions, but a guarantee of revenues is a lopsided holdover from the days of rate regulation. In addition, the Plan needlessly alters the existing scheme of interconnection in a way that benefits incumbent carriers and harms those who seek interconnection. Rather than promoting the advancement of facilities based competition through interconnection, the Plan focuses control of interconnection with the incumbent carriers.

As most of the Plan's reforms are implemented at Step 1, there is little or no actual transition period that occurs under the Plan. The Ohio Commission questions the need to adopt such a wholesale drastic change when there is evidence that some of the reform contemplated by the Plan is already taking place. An example is the FCC's requirement that VoIP providers pay into the Universal

Service Fund. While more needs to be done to ensure that compensation reform does in fact occur, the Ohio Commission does not believe that demolition of the wholesale markets, as would occur under the Plan, is necessary and recommends a more measured approach in rolling out any proposed reforms. In short, rather than replacing a broken system with a system that is flawed in different ways, the focus should be on fixing what doesn't work in the current system. Furthermore, as the Plan is open-ended, there is no guarantee that additional, and possibly even more radical, "reform" could not take place under the Plan. At both Step 4 and Step 6 the Plan is open for additional FCC review and modification, leaving the door open for further reforms not presently contemplated by the Plan.

Any reform plan that is adopted must preserve state authority over intrastate intercarrier compensation; however, it must also do much more to adequately reform the present intercarrier compensation regime in a measured and balanced manner. At a minimum, reform should not unduly benefit one group of stakeholders at the expense of others. Consumers must not be shackled with the primary burden of financing intercarrier compensation reform. The interests of consumers and carriers of all types must be considered in formulating an equitable plan to avoid creating windfall opportunities for any one interest. Going further, reforming the present intercarrier compensation regime does not require completely abandoning long held standards that have been proven to be effective. Nonetheless, reform must account for new and emerging technologies in a truly cost-based compensation regime that unifies each carrier's compensation rates into a single rate regardless of the underlying technology of the call. Finally, consideration must be paid to the effect the Plan will have on tangential issues such as numbering resources.

The FCC has before it a number of different approaches to resolving the problems in the existing intercarrier compensation structure. Many of these approaches have aspects which commend them. The FCC should not feel constrained to wholesale adoption of any one proposal, even one that purports to be a consensus. The FCC has the authority to select those aspects of each proposal that genuinely resolve issues, and apply them. Only through such an approach will intercarrier compensation reform be achieved that balances the numerous issues and interests involved in carrying out such a necessary and overdue undertaking.

CONCLUSION

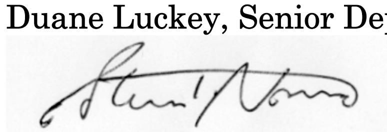
The Ohio Commission wishes to thank the FCC for the opportunity to comment in this proceeding.

Respectfully submitted,

Public Utilities Commission of Ohio

By its Attorneys:

Jim Petro
Attorney General of Ohio
Duane Luckey, Senior Deputy



Steven T. Nourse
Steven L. Beeler
Assistant Attorneys General
Public Utilities Section
180 East Broad Street
Columbus, Ohio 43215-3793
(614) 466-4396

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